U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: OCT 10 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Josh for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an information technology/engineering services company. It seeks to permanently employ the beneficiary in the United States as a system analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

At issue in this case is whether the beneficiary possesses an advanced degree as required by the terms of the labor certification and the requested preference classification.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is March 20, 2006.[2]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's in Computer Science.
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Bachelor's degree and five years of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Any suitable combination of education, training or experience is acceptable.

Part J of the labor certification states that the beneficiary possesses a Bachelor's degree in Computer Science from [redacted] India, completed in 1990. The record contains a copy of the beneficiary's Bachelor of Science diploma and transcripts from [redacted] India, issued in 1990. In addition, the record further contains: a "PGDCA" certificate and transcript from [redacted] India in 1995; a Diploma in Hardware and Networking from [redacted] India received in 2000; a Professional Diploma and transcript from the [redacted] India in 2001; a Quality Management Program from the [redacted]

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

undated; and a Certificate of Achievement from India with an undated completion date.

The record also contains an evaluation of the beneficiary's educational credentials prepared by for on June 19, 2013. The evaluation states that "it is the judgment of that the beneficiary's Bachelor of Science Degree, Part II: Botany, Zoology, Chemistry, plus five years of employment experience is equivalent to Master of Science Degree in Computer Science.

The response to the NOID also contained an evaluation prepared by for dated, June 8, 2013. A previous evaluation from Mr. dated July 9, 2011 was submitted with the appeal. In his second evaluation, Mr. concludes that the beneficiary's Bachelor of Science Degree with Part II: Botany, Zoology, Chemistry from in India "is equivalent to the degree of Bachelor of Science, representing 141 semester credit hours, from an institution of postsecondary education in the United States." The evaluator further states: "The equivalency provided by is based on informed opinion as an expert in the field of international credentials." The evaluator further concludes that: "The beneficiary's foreign equivalent of a bachelor's degree plus five years of experience has established an equivalency in our opinion to the degree of: Master of Science in Computer Science from an institution of post-secondary education in the United States."

The record additionally contained an evaluation submitted and prepared by for the dated, March 20, 2006. This evaluator concluded that the beneficiary's degree from is equivalent to three-years of academic studies towards a Bachelor of Science Degree from an accredited college or university in the United States. The evaluator further indicated that the degree from in combination with his Post-Graduate "Diploma" from would amount to the equivalent of a four-year degree in computer science.

Part K of the labor certification states that the beneficiary possesses the following employment experience:

- System Analyst with New Jersey from April 1, 2003 to March 20, 2006.
- Systems Analyst with New Jersey from October 1, 2001 to March 31, 2003.
- System Analyst with California from August 9, 2001 to September 30, 2001.
- System Analyst with India from January 1, 2001 to July 30, 2001.
- System Analyst with India from October 4, 1999 to December 31, 2000.
- System Analyst with from September 1, 1997 to September 30, 1999.

The record contains experience letters from:

- on company letterhead indicating that, the company employed the beneficiary as a System Administrator from October 2001 until April 2003.
- on company letterhead indicating that, the company employed the beneficiary as a System Administrator from August 2001 until October 2001.
- on company letterhead indicating that, the company employed the beneficiary as System Administrator from January 2, 2001 to July 31, 2001.
- on company letterhead indicating that, the company employed the beneficiary as a System Administrator from October 1999 until the date of the letter, on December 30, 2000.
- on company letterhead indicating that, the company employed the beneficiary as a System Administrator from September 1997 until September 1999.
- on its letterhead indicating that, it employed the beneficiary as a Network Administrator from February 1, 1995 until August 31, 1997.

The director's decision denying the petition indicated that the petitioner had not demonstrated that the beneficiary met the minimum educational requirements of the labor certification at the time the request for certification was filed. Specifically, the director determined that based on the evidence presented, the beneficiary did not possess a single degree which was determined to be a foreign equivalent to a U.S. bachelor's degree in order to meet the requirements of an equivalent master's degree, and was therefore, ineligible for classification as a second preference alien.

On appeal, the petitioner states that the evaluations of the beneficiary's credentials established that the beneficiary possesses the education and five years of employment experience required for a foreign equivalent to a Master of Science Degree in Computer Science. Further, the petitioner indicates that the evidence demonstrates that the beneficiary possesses the foreign equivalent to a Master of Science in Computer Science from an institution of postsecondary education in the United States.

Counsel indicates that the USCIS did not address all of the evidence presented including a more than 400 page reference document included with Mr. s 2011 evaluation and also referenced by Ms. 's 2011 evaluation. Counsel also asserts that it is unreasonable for USCIS to rely on the Electronic Database for Global Education (EDGE) as a basis for judgment given that EDGE is a proprietary, paid for-service that requires membership for access. Counsel further asserts that UNESCO provides equivalence for the three-year degree to a U.S. bachelor's degree and UNESCO regulations are legally binding instruments. Counsel also asserts that the equivalency to that of a U.S. Master's degree in Computer Science can be established between the beneficiary's bachelor's degree and five years employment experience under separate case law.

The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.[3] The AAO considers all pertinent evidence in

[3] *See* 5 U.S.C. 557(b) (On appeal from or review of the initial decision, the agency has all the powers

the record, including new evidence properly submitted upon appeal.[4] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[5]

II. LAW AND ANALYSIS

The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-*

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which it would have in making the initial decision except as it may limit the issues on notice or by rule.); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[4] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[5] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

> *Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[6] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

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[6] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

Eligibility for the Classification Sought

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms advanced degree and profession. An advanced degree is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A profession is defined as one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. The occupations listed at section 101(a)(32) of the Act are architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an advanced degree is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

When the beneficiary relies on a bachelor's degree (and five years of progressive experience) for qualification as an advanced degree professional, the degree must be a single U.S. bachelor's (or foreign equivalent) degree. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the legacy INS responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990) and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an

advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold at least a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a foreign equivalent degree.[7] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the foreign equivalent degree of a United States baccalaureate degree. *See* 8 C.F.R. § 204.5(k)(2).

The beneficiary's degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree. For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. The AAO cannot conclude that the evidence required to demonstrate that a beneficiary is an advanced degree professional is any less than the evidence required to show that the beneficiary is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *See Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *per APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30706 (July 5, 1991).[8]

In addition, a three-year bachelor's degree will generally not be considered to be the "foreign equivalent" of a United States baccalaureate degree. *See Matter of Shah*, 17 I&N Dec. 244 (Reg'l.

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[7] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of H-1B nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

[8] *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, diploma, certificate or similar award from a college, university, school or other institution of learning relating to the area of exceptional ability").

Comm'r. 1977).[9] *See Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) (for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree); *see also Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010) (the beneficiary's three-year bachelor's degree was not the foreign equivalent of a U.S. bachelor's degree).

In the instant case, the petitioner relies on the beneficiary's three-year Bachelor of Science from India as being equivalent to a U.S. bachelor's degree.

As is noted above, the record contains an evaluation of the beneficiary's educational credentials prepared by on June 19, 2013 which concludes that, "it is the judgment of that the beneficiary's Bachelor of Science Degree, Part II: Botany, Zoology, Chemistry, plus five years of employment experience is equivalent to Master of Science Degree in Computer Science."[10] The record further contained an evaluation prepared by for on June 13, 2013. In his evaluation Mr. concludes that the beneficiary's Bachelor of Science Degree with Part II: Botany, Zoology, Chemistry from in India "is the equivalent to the degree of Bachelor of Science, representing 141 semester credit hours, from an institution of postsecondary education in the United States." An evaluation from for the March 20, 2006 was also in the record from a prior petition based on the same labor certification. This evaluator concluded that the beneficiary's degree from is equivalent to three-years of academic studies towards a Bachelor of Science Degree from an accredited college or university in the United States.

The evaluator for did not indicate that an evaluation of the beneficiary's other education credentials was conducted, and offered no explanation for their omission. The evaluator also does not offer any substantive description of how she arrived at her assessment of the beneficiary's credentials other than indicating the name of another case in her evaluation. However, while naming this case, the evaluator provided no legal citation or

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[9] In *Matter of Shah* the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Id.* at 245.

[10] USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

summary of facts to indicate why it would be relevant in the case at hand.

The petitioner previously submitted another evaluation of the beneficiary's credentials prepared by Ms. Danzig, on July 12, 2011, which was found to be insufficient to demonstrate the conclusion that the beneficiary possesses the foreign equivalent to a U.S. bachelor's degree. The petitioner was given notification of this issue by the AAO in a notice of intent to dismiss (NOID), dated May 29, 2013. However, the petitioner in its response to the NOID asked to withdraw the 2011 evaluation from from further consideration in its appeal. The petitioner submitted a new evaluation from the same source, and the June 19, 2013 evaluation will be viewed as an opportunity for the petitioner to meet the concerns the AAO discussed in the NOID.[11] In the 2013 evaluation, the evaluator indicates that the beneficiary's three-year bachelor's degree along with five years of employment experience is equivalent to a Master of Science Degree in Computer Science, but failed to discuss the formula used to arrive at this conclusion.

The evaluator further indicates that the beneficiary took courses only in English, Telugu, Zoology and Chemistry. The evaluation states that the beneficiary "was awarded a Bachelor of Science Degree Part II Botany, Zoology and Chemistry." The evaluator states that the beneficiary earned the equivalent of 140 credit hours with a GPA of 2.9. The course listing provided is the same as the listing in the evaluator's 2011 evaluation however, without explanation as to the difference. The evaluator concluded in 2011 that the beneficiary earned the equivalent of 120 credit hours and a GPA of 2.64. Both evaluations cite a formula based on the "Carnegie Unit" to arrive at these conclusions, however; the 2013 evaluation does not discuss why this formula generated a different result in 2013 than it did in 2011, based on the same degree and list of courses. Further, the 2013 evaluation states that the beneficiary's "education plus 5 years work experience" is equivalent to a U.S. Master of Science Degree in Computer Science. However, the evaluator states that the only credential reviewed was the "Bachelor of Science Degree, Part II Botany, Zoology, and Chemistry." Further, the 23 page evaluation at no point discusses any of the beneficiary's experience, despite the conclusion provided on page 1. Therefore, the evaluation appears to be conclusory and not based on a review of, or supported by, the evidence to establish that the beneficiary's Bachelor of Science Degree in Part II: Botany, Zoology, Chemistry equates to a U.S. bachelor's degree in Computer Science. Moreover, according to the transcript of courses submitted into the record for the beneficiary from there is no indication that any computer courses were taken during his course of study at that institution.

In addition, the evaluator also concluded that the beneficiary holds a three-year bachelor's degree which is insufficient for qualification under the EB-2 advanced degree professional immigrant visa petition category. *See, Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006).

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[11] On page 3 of the petitioner's/counsel's response there is a request to "withdraw" this evaluation because "it did not adequately address the beneficiary's education." However, on page 4, counsel asserts "the documentation provided were [*sic*] evidence backed opinions."

Accordingly, we do not find the determination of the credentials evaluation conducted by to be probative in this matter. It is further noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm'r 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Id.* at 245.

Mr. 's evaluation also did not indicate that an evaluation of the beneficiary's other education credentials was considered, and offered no explanation for their omission. The evaluator indicates in both his 2011 and 2013 evaluations that the beneficiary's Bachelor of Science Degree is the only credential utilized in his determinations for both reports.

However, as with the evaluations from Mr. 's evaluations also offer inconsistent information while utilizing the same data in both of his determinations.[12] Mr. indicates in his second evaluation, prepared on June 18, 2013, that the beneficiary's 2,120 contact or class hours equate to 141 U.S. semester credit hours. The evaluator indicates that this 2013 determination is based on a letter from the beneficiary's university and a "Federal formula" also referred to as the "Carnegie Unit." However, in his 2011 evaluation the evaluator also indicates he uses the same Carnegie Unit measurement of these contact hours to offer an opinion that the beneficiary's contact hours during his pursuit of a Bachelor of Science degree from is equal to 120 credit hours when converted to a U.S. system. The evaluator offered no explanation for the inconsistent findings in his two evaluations although indicating that he utilized the same information and method for evaluating the beneficiary's educational credential.

Mr. further relies on a UNESCO document in both of his evaluations. The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for inclusion in a class of individuals defined by statute and regulation as eligible for immigration benefits. More significantly, the recommendation does not define "comparable qualification." At the heart of this matter is whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

In fact, UNESCO's publication, "The Handbook on Diplomas, Degrees and Other Certificates in Higher Education in Asia and the Pacific" 82 (2d ed. 2004) (accessed on July 18, 2013 at http://unesdoc.unesco.org/images/0013/001388/138853E.pdf), provides:

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[12] On page two of the petitioner's response, counsel on behalf of the petitioner requests that the AAO "withdraw" the first evaluation "because it did not adequately address the beneficiary's education." However, in page four, counsel asserts, "The documentation provided were [*sic*] evidence backed opinions."

> Most of the universities and the institutions recognized by the UGC or by other authorized public agencies in India are members of the Association of Commonwealth Universities. Besides, India is party to a few UNESCO conventions and there also exists a few bilateral agreements, protocols and conventions between India and a few countries on the recognition of degrees and diplomas awarded by the Indian universities. But many foreign universities adopt their own approach in finding out the equivalence of Indian degrees and diplomas and their recognition, just as Indian universities do in the case of foreign degrees and diplomas. The Association of Indian Universities plays an important role in this. *There are no agreements that necessarily bind India and other governments/universities to recognize, en masse, all the degrees/diplomas of all the universities either on a mutual basis or on a multilateral basis.* Of late, many foreign universities and institutions are entering into the higher education arena in the country. Methods of recognition of such institutions and the courses offered by them are under serious consideration of the government of India. UGC, AICTE and AIU are developing criteria and mechanisms regarding the same.

Id. at 84. (Emphasis added.)

Mr. further concludes that the beneficiary's three-year bachelor's degree has "durational comparability" with a U.S. bachelor's by finding "the Indian bachelor's program contains as many if not more contact hours during it three-years than the U.S. bachelor's does in its four." Mr. further speculates that the admission requirements for a master's program in computer science, which might admit students with bachelor's degrees in other disciplines, justify the conclusion that the beneficiary's Bachelor of Science Degree with Part II: Botany, Zoology, and Chemistry is equivalent to a degree in computer science. It must again be noted that that according to the beneficiary's transcript from no computer science based courses were part of the curriculum.

Further, Mr. 's conclusion that the admission requirements for post-graduate study can demonstrate the equivalency of two disparate undergraduate degrees is not supported by the record; the degree requirement at issue is for an offer employment, which presumes a minimum level of education, set by the petitioner, in a specific subject matter, determined by the petitioner, so that the employee may perform in the position. Mr. s argument is not persuasive, as the admission requirements for postgraduate studies may be generalized, as the purpose of those programs is the student's further education in a specific subject matter, and the postgraduate student has the opportunity to take additional courses after admission to ensure their competency in the core subject matter area prior to completing the postgraduate degree. Therefore, this evaluation does not provide a credible basis on which to determine that the beneficiary's Bachelor of Science Degree from with a major in Part II: Botany, Zoology, and Chemistry is equivalent to the required four-year bachelor of science in computer science as required on the labor certification for the position offered.

Mr. also goes on at length about Carnegie Units and Indian degrees in general, concluding that the beneficiary's three-year degree is equivalent to a U.S. baccalaureate but makes no attempt to assign credits for individual courses. Mr. s credibility is serious diminished as he completely distorts an article by Specifically, Mr. asserts that this article concludes that because the United States is willing to consider three-year degrees from Israel and the European Union, "Indian bachelor degree-holders should be provided the same opportunity to pursue graduate education in the U.S." While this is the conclusion of the article, the specific means by which Indian bachelor degree holders might pursue graduate education in the United States provided in the discussion portion of the article in no way suggests that Indian three-year degrees are, in general, comparable to a U.S. baccalaureate. Specifically, the article proposes accepting a first class honors three-year degree *following* a secondary degree from a CBSE or CISCE program *or* a three-year degree *plus* a post graduate diploma from an institution that is accredited or recognized by the NAAC and/or AICTE. The record contains no evidence that the beneficiary in this matter received a secondary degree from a CBSE or CISCE program. Thus, Mr. s reliance on this article is disingenuous. It must also be again noted that Mr. utilized the same formula to assess the same educational credential of the beneficiary in 2011 and 2013, but offered differing opinions as to the equivalent U.S. bachelor degree semester credit hours according to both of his evaluations.

In addition, Mr. s reliance on *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. Nov. 30, 2006) is equally misplaced. In that case, the alien not only had a credential beyond a three-year degree, the judge determined that even with that extra credential, the alien was only eligible as a skilled worker pursuant to section 203(b)(3) of the Act, and *not* as either a professional or an advanced degree professional pursuant to section 203(b)(2) of the Act. *Id.*

Mr. also relies on an article he coauthored with Ms. The record contains no evidence that this article was published in a peer-reviewed publication or anywhere other than the Internet. The article includes British colleges that accept three-year degrees for admission to graduate school but concedes that "a number of other universities" would not accept three-year degrees for admission to graduate school. Similarly, the article lists some U.S. universities that accept three-year degrees for admission to graduate school but acknowledges that others do not. In fact, the article concedes:

> None of the members of N.A.C.E.S. who were approached were willing to grant equivalency to a bachelor's degree from a regionally accredited institution in the United States, although we heard anecdotally that one, W.E.S. had been interested in doing so.
>
> In this process, we encountered a number of the objections to equivalency that have already been discussed.
>
> Ed.D., President of commented thus,

> "Contrary to your statement, a degree from a three-year "Bologna Process" bachelor's degree program in Europe will NOT be accepted as a degree by the majority of universities in the United States. Similarly, the majority do not accept a bachelor's degree from a three-year program in India or any other country except England. England is a unique situation because of the specialized nature of Form VI."
>
> * * *
>
> International Education Consultants of raise similar objections to those raised by ECE.,
>
> "The Indian educational system, along with that of Canada and some other countries, generally adopted the UK-pattern 3-year degree. But the UK retained the important preliminary A level examinations. These examinations are used for advanced standing credit in the UK; we follow their lead, and use those examinations to constitute the an [sic] additional year of undergraduate study. The combination of these two entities is equivalent to a 4-year US Bachelor's degree.
>
> The Indian educational system dropped that advanced standing year. You enter a 3-year Indian degree program directly from Year 12 of your education. In the US, there are no degree programs entered from a stage lower than Year 12, and there are no 3-year degree programs. Without the additional advanced standing year, there's no equivalency.

Finally, these materials do not examine whether those few U.S. institutions that may accept a three-year degree for graduate admission do so on the condition that the holder of a three-year degree complete extra credits.

Mr. indicates that based on his determination the beneficiary holds a foreign equivalent of a bachelor's degree, and that degree coupled with five years of experience, establishes an equivalency to the degree of: Master of Science in Computer Science from an institution of post-secondary education in the United States. However, Mr. 's evaluations are found to be insufficient to demonstrate that the beneficiary holds the foreign equivalent of a U.S. Bachelor's degree for the reasons stated above and therefore, the stated credentials are also insufficient to establish that the beneficiary possesses the equivalency of a Master of Science in Computer Science.

In addition, the record also contains an evaluation prepared by prepared by for the Trustforte Corporation March 20, 2006. The AAO determined in a prior appeal of another petition based on the same labor certification, that this evaluation did not sufficiently demonstrate that the beneficiary possessed a foreign equivalent to a U.S. bachelor's degree. No further evaluations were submitted from this company or evaluator for the record.

Counsel in the response to the NOID asserts that the USCIS did not address all of the evidence including a more than 400 page document submitted with the prior evaluation from The evaluations from both rely on this attachment in their 2011 and 2013 evaluations. However, it is unclear what in the attachment changed or warranted their new findings in 2013, since their reference is purportedly the same. Nevertheless, as previously indicated, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

Counsel also asserts that USCIS should not utilize EDGE in their decisions because it is a fee-based source. UCIS utilizes EDGE as but one source in making a determination regarding educational credentials in addition to all evidence submitted into the record. Moreover, courts have agreed that the USCIS use of EDGE within reasonable standards of review. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), a federal district court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), a federal district court upheld a USCIS conclusion that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience. The EDGE report was provided to counsel with the NOID, and the petitioner was thus, given an opportunity to address these issues. It is therefore unclear what impact the EDGE report has if it is fee based, or publicly available information. The petitioner was provided an opportunity to rebut any derogatory information pursuant to 8 C.F.R. § 103.2(b)(16)(i) in the NOID and also informed that any additional credentials evaluation submitted in response to the notice should specifically address the conclusions of EDGE set forth in the NOID.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) as one source of information regarding education credentials. According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." http://www.aacrao.org/About-AACRAO.aspx

(accessed July 18, 2013). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php (accessed July 18, 2013).

Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

In the section related to the Indian educational system, EDGE provides that a Bachelor of Science "represents the attainment of a level of education comparable to two to three years of university study in the United States." This information contradicts the evaluations from [redacted] and [redacted] EDGE's conclusion is in line with the conclusions of the [redacted]

We have also reviewed AACRAO's Project for International Education Research (PIER) publications: the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). We note that the 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. The *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* at 43. As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual.

One of the PIER publications also reveals that a year-for-year analysis is an accurate way to evaluate Indian post-secondary education. *A P.I.E.R. Workshop Report on South Asia* at 180 explicitly states that "transfer credits should be considered on a year-by-year basis starting with post-Grade 12 year." The chart that follows states that 12 years of primary and secondary education followed by a three-year baccalaureate "may be considered for undergraduate admission with possible advanced standing up to three years (0-90 semester credits) to be determined through a course to course analysis." This information supports the conclusion of EDGE and casts doubt on the evaluations submitted by the petitioner. As noted above, the petitioner has submitted three evaluations on appeal, and two additional evaluations in response to the AAO's NOID. However, these evaluations are inconsistent in their conclusions.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel further asserts that UNESCO provides equivalence for the three-year degree to a U.S. bachelor's degree and UNESCO regulations are legally binding instruments, and counsel suggests that they are also binding in this case. The evaluation submitted by the petitioner from the references as exhibits additional correspondence and research regarding educational equivalency including from, the United Nations Educational Scientific and Cultural Organization (UNESCO) regarding recognition of foreign educational qualifications. These items do not establish that the beneficiary's degree is equivalent to a U.S. bachelor's degree. UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. See http://en.unesco.org/ (accessed July 18, 2013).

The recommendation provided relates to "recognition" of qualifications awarded in higher education. Paragraph 1(e) defines recognition as follows:

> Recognition of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State and deemed comparable, for the purposes of access to or further pursuit of higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for inclusion in a class of individuals defined by statute and regulation as eligible for immigration benefits. More significantly, the recommendation does not define "comparable qualification." At the heart of this matter is whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

Counsel also asserts that caselaw establishes that equivalency to a Master's degree in Computer Science can be established between the beneficiary's bachelor's degree and five years employment experience. Counsel cites to *Chintakuntia v. INS,* No. C-99-5211 MMC ND (May 4, 2000), indicating it provides that a U.S. or foreign bachelor's degree and five years of experience shall be

accepted as the equivalent of a United States Master's degree for the purposes of EB-2 classification regardless of the stipulations on the labor certification as to educational requirements.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), in pertinent part provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.* The case referenced by counsel does not stand for the proposition that a beneficiary could qualify for classification as an advanced degree professional with less than a full U.S. bachelor's degree or foreign degree equivalent.
However, in order to consider whether the beneficiary's education and employment experience are equivalent to a Master's Degree there must a predicate finding that he holds a foreign equivalent to a U.S. bachelor's degree. This educational requirement has not been sufficiently demonstrated in the instant cases. After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary possessed at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. Therefore, the beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

The Minimum Requirements of the Offered Position

The petitioner must also establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's

interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification as filed states that the offered position requires Master's Degree in Computer Science. The beneficiary's three-year Bachelor of Science Degree from is in Part II: Botany, Zoology, and Chemistry. Therefore, it has not been demonstrated that the beneficiary's degree was in the correct field of study, in addition to it not being found to be the foreign equivalent to a U.S. bachelor's degree. It must also be noted that according to the petitioner's own website the beneficiary's bachelor's degree is in the field of biology. *See* (accessed 09/20/13).

For the reasons explained above, the petitioner has failed to establish that the beneficiary possesses a Master's Degree in Computer Science, or a foreign equivalent degree to a U.S. bachelor's, and that his three-year bachelor's degree is in the correct field of study.

In addition, the petitioner had also failed to establish that the petitioner possesses the required five years of experience for the offered position.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

As discussed above, the record contains six letters that the petitioner submitted from the beneficiary's various employers. Five of the six employers indicate that the beneficiary was employed as a System Analyst and one indicated he worked as a Network Administrator. All of the letters submitted were brief and general in their descriptions of the beneficiary's duties within the companies, and failed to offer substantive details regarding his work experience in the stated positions, as required under the regulations. The letter from indicates the beneficiary actively worked on various projects involving implanting and maintaining LAN Networks, Software and hardware installation, but failed to indicate any particular projects on which the beneficiary gained experience. The letter from indicates that the beneficiary was mainly involved in the System Administration and Other projects using Oracle PL/SQL, JAVA, WebSphere and Veritas Volume Manager but offered no specific details as to how he was involved with these systems or projects during his tenure at the company. indicated in its letter that the beneficiary was found to process strong Administration skills in various CAD/CAM Projects using VERITAS Volume Manager, Check Point, NFS, NIS & Backups, and participated both technically

and managerially, but also failed to supply with any specificity the types of projects or duties he was working on while with the company. indicated in its letter that the beneficiary was working as a System Administrator (Solaris) but also offered no further information regarding his duties in that capacity. indicated the beneficiary was employed as a Network Administrator, but submitted no further information regarding that employment. All of the experience letters while naming the position and dates of employment offered little or no further details regarding that employment with the entities as is necessary to establish that the employment experience of the beneficiary meets the requirements under the labor certification. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

Therefore, the submitted experience letters do not establish that the beneficiary possessed the required experience for the offered position.

The petitioner failed to establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must also be denied for this reason.

Beyond the decision of the director, the petitioner has also not sufficiently demonstrated that a *bona fide* job offer existed at the time the labor certification was filed. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

> The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. *See Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000).

The ETA Form 9089 specifically asks in Section C.9: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The petitioner identified that it was an entity with 29 employees, and checked "no" to the question of whether the beneficiary was related to the owner. In determining whether the job is subject to the alien's influence and control, the adjudicator will look to the totality of the circumstances. *See Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the PERM regulations. *See* 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) and states in pertinent part:

> (l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:
>
> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
>
> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
>
> (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
>
> (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
>
> (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

The petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361.

In this case, the petitioner indicated in its labor certification filing that it sought to employ the beneficiary as a system analyst. However, according to the entity's website the beneficiary is listed under "management" and it further states that he joined the company to "lead its IT business." *See* (http://www.e-zencomp.com/management.html, accessed August 21, 2013). There is no indication on the petitioner's website that the beneficiary is currently or would in the future be employed in a

different capacity other than as a part of its management, who leads its IT business. The petitioner has not demonstrated by the evidence in the record that the DOL was aware of the beneficiary's role as a lead manager in the company at the time the labor certification was filed. This information suggests that the job opportunity was subject to the beneficiary's influence and control, and that the petitioner may not have intended to employ the beneficiary in the position offered.

In addition, two Notices of Entry of Appearance as Attorney or Accredited Representative, Form G-28s, filed with the petitioner's response to the AAO's NOID, were signed by the beneficiary as the individual directing the appeal. The record shows that on one of these Form G-28s dated June 25, 2013, Part 3, Section 5 indicates it is submitted at the request of the named beneficiary, and is signed by the beneficiary. The second Form G-28, also dated June 25, 2013, although indicating it is submitted at the request of the petitioning entity on Part 3, Section 5, was likewise signed by the beneficiary. The beneficiary's signatures on this second Form G-28 is in contravention to the regulations. *See* 8 C.F.R. § 103.3(a)(1)(iii). The petitioner has provided two Form G-28s indicating that one was for the petitioning entity, and the other was for beneficiary both containing the beneficiary's signature. This would suggest that the beneficiary, is directing the job opportunity, as well as the petition, and the appeal of its decision.

In the instant matter, the AAO requested a new Form G-28, properly completed and signed by the petitioner, on August 21, 2013. A new Form G-28 was submitted on August 22, 2013, and signed by a different individual indicating it was on behalf of the petitioner. This new Form G-28 dated August 22, 2013, was also accompanied by a letter. The letter is signed by Mr. who indicates he is the Vice President of the petitioning entity, and the designated official authorized to sign the Form G-28 on behalf of the pending I-140 petition for the beneficiary. However, in analyzing the totality of the circumstances, the record demonstrates: that the beneficiary is listed on the company's public website as a leading manager of the entity, with the responsibility for controlling its entire IT department, rather than as an employee who is being hired to work as a system analyst in accordance with the terms of the labor certification; and in addition, the beneficiary initially signed the Form G-28 for the petitioner, indicating under penalty of perjury that he was duly authorized to consent to counsel's representation on behalf of the petitioner. In a totality of the circumstances analysis, this evidence casts doubt on whether a *bona fide* job offer existed at the time the labor certification was filed pursuant to 20 C.F.R. § 656.17(c).

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988), states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification.

Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed.

In addition, beyond the decision of the director, the petitioner has also not demonstrated that a *bona fide* job offer existed at the time the labor certification was filed. The petitioner has not established that a valid job offer was available to all eligible American workers during the labor certification process, as it has insufficiently shown that there was intent to employ the beneficiary in the position offered in accordance with the terms of the labor certification. The record of proceedings suggests the job opportunity may have been subject to the beneficiary's influence and control. Thus, the petitioner has not shown that a *bona fide* employment position was being offered at the time the labor certification was filed, or at any time thereafter.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.